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76-199

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Mr. John J. Moran
Director
State of Arizona
Department of Corrections
1601 West Jefferson
Phoenix, Arizona 85007

Dear Mr. Moran:

On April 16, 1976, you asked this office to answer substantially this question:

> When the Superior Court orders a defendant, who is also a state prisoner, to be examined by the state hospital to determine his competency to stand trial (pursuant to Ariz. R. Cr. Proc. Rule 11.2), is the State responsible for the state hospital expenses?

The question is posed by a situation involving the escape of two inmates from the Ft. Grant Training Center. Prior to their trial for escape, the Superior Court, pursuant to Rule 11.2, ordered that the defendants be examined at the State Hospital. The State Hospital billed Graham County and subsequently the County requested that the State pay the State Hospital bill.

The resolution of the question is determined by the interpretation of A.R.S. § 31-227:

> §31-227. Reimbursing county for expense of trial
>
> A. When a prisoner confined in the state prison is tried within the state of Arizona for any crime committed therein or committed while escaped from the state prison or from the custody of officials or employees while away from the state prison, the clerk of the court in which trial is held shall prepare an itemized claim against the state for the court costs and any other costs or fees in-

> curred by the county upon the prosecution and defense of the trial, and the cost of confining and keeping the prisoner. The claim shall be certified by the judge of the court and sent to the governor for approval.
>
> B. Upon approval, the governor shall file the claim with the commissioner of finance and it shall be paid from the appropriation for the support of the prison to the county treasurer of the county where the trial was held.

The section in effect makes the State liable for costs incurred by the County in prosecuting a state prisoner. Discussion centers on two separate issues: (1) the relevance of the fact that the escape was from Ft. Grant Training Center as opposed to "the state prison" at Florence; (2) whether the expense of conducting a Rule 11.2 examination is "costs or fees incurred by the county upon the prosecution and defense of the trial."

I. Although § 31-227(A) is inartfully drafted, the thrust of the section appears to make the state liable for the expenses in trying a prisoner charged with any crime. The phrase "a prisoner confined in the state prison" is a generic expression meaning "those incarcerated in a state institution." The conclusion is dictated by either a broad or narrow interpretation of the statute.

Nowhere in Title 31 is "the state prison" defined. An analysis of other statutes indicates that "the state prison" is not within any single meaning. In § 31-201 the following definition is given:

> As used in this Chapter, the terms 'superintendent' or 'superintendent of the state prison' means the department of corrections.

However, see A.R.S. § 31-261 where authority is given for products of individual prisoners to be sold at "the sites of the department of correction's institutions and facilities."

A broad reading of § 31-227 reference to "prisoner confined in the state prison" would conclude that as in § 31-201 "the state prison" is the equivalent of department of corrections. Yet one may conclude from § 31-261 that when all department of

corrections institutions are to be included, the statute will so indicate. But even such a narrow reading of the statute is inapplicable to § 31-227. In § 31-227 the legislature has indicated that a prisoner confined in the state prison does not lose his identity as being confined in the state prison as long as he remains in the custody of prison officials or employees.

From a policy point of view there is no reason to treat escape from the facility at Florence different from an escape from any other state correctional institution. A county should not have to bear the expense of trials for state prisoners simply because the institution is within its jurisdiction. In fact, there is a strong argument that counties with minimum security institutions have a greater claim for reimbursement due to the relatively higher risk of escape from those institutions.

In sum, reimbursement by the state to any county which has within its jurisdiction a state correctional institution is proper.

II. The general provision dealing with Rule 11.2 examinations is found in A.R.S. § 13-1623:

> § 13-1623. Expenses of maintenance of insane defendant as county charge
>
> When a defendant in a criminal action, any time prior to pronouncement of sentence, is committed to the state hospital, the expenses of transporting him to and from the hospital and of maintaining him while confined therein shall be a charge against the county in which the indictment was found or information filed, but the county may recover such expenses from the estate of the defendant or from a relative, town, city or county required by law to provide for and maintain the defendant.

One should note that the State is not one of the parties specifically mentioned from whom the County may seek reimbursement. However, in § 31-227 the county is given explicit authority to seek reimbursement from the State when the defendant is a state prisoner. The general provisions of § 13-1623 are modified by § 31-227. The issue becomes whether a Rule 11.2 examination is a cost or fee incurred by the County upon the prosecution and defense of the trial.

Clearly a defendant cannot be tried where there is a question as to the defendant's ability to understand the proceedings against him and to assist in his defense. Dusky v. United States, 362 U.S. 402 (1960). It is also clear that the trial court has an obligation to order a competency examination on its own motion if there is any question as to the defendant's competency. Pate v. Robinson, 383 U.S. 375 (1966). Consequently, the expenses incurred in a Rule 11.2 examination indeed are costs necessarily incurred in the prosecution and defense of certain defendants.

To answer whether these are costs "incurred by the county," one must refer to § 13-1623. The earliest version of § 13-1623 is 1153 P.C. 1901:

> The expenses of sending the defendant to the asylum, of keeping him there, and of bringing him back, are in the first instance chargeable to the county in which the indictment was found or information filed, but the county may recover them from the estate of the defendant, if he has any, or from a relative, town, city, or county bound to provide for and maintain.

The provision is originally taken from § 1373 of the California Penal Code, and appears as § 5201 of the Arizona Penal Code of 1928 and as § 44-1706 of the Arizona Penal Code of 1939.

The interpretation of § 13-1623 must be made in light of the previous codifications. The main issue is whether "maintaining" a defendant at the state hospital includes the costs of examining the defendant. There is no indication that the legislature intended to make § 13-1623 more restrictive than the earlier codifications. There is no indication that the statute was intended to make the county responsible merely for transporting, feeding and clothing the defendant while placing on the State the costs of examining the defendant. In keeping with the established practice, "maintaining" under § 13-1623 should be read as the costs "of keeping him there" as found in the earlier codification. "Maintaining" the defendant, then, includes the costs of examining the defendant.

Sincerely,

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